

2
No. 2323.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS MASON, L. O. CLARK, JOHANNA
FARLIN, C. C. CLARK, L. P. FORE-
TELL, A. F. BUSHNELL, JOHN
DOLAN, PAT LEROUS, J. T. FITZ-
GERALD AND ELIZABETH BROWN,
Appellants,

vs.

WASHINGTON-BUTTE MINING COM-
PANY, a Corporation,
Appellee.

BRIEF OF APPELLANTS.

WALSH, NOLAN & SCALLON,
and
J. A. POORE,
Solicitors for Defendants and Appellants.

Filed February 10 1914.

FILED

FEB 10 1914

Clerk.

No. 2323.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS MASON, L. O. CLARK, JOHANNA
FARLIN, C. C. CLARK, L. P. FORE-
TELL, A. F. BUSHNELL, JOHN
DOLAN, PAT LEROUS, J. T. FITZ-
GERALD AND ELIZABETH BROWN,
Appellants,

vs.

WASHINGTON-BUTTE MINING COM-
PANY, a Corporation,
Appellee.

BRIEF OF APPELLANTS.

WALSH, NOLAN & SCALLON,
and
J. A. POORE,
Solicitors for Defendants and Appellants.

No. 2323.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS MASON, ET AL.,

Appellants,

vs.

WASHINGTON-BUTTE MINING COM-
PANY, a Corporation,

Appellee.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal by the defendants (appellants) from the decree entered by the District Court of the United States, for the District of Montana, on the 4th day of January, 1913.

On May 11, 1910, the Appellee filed its bill of complaint in the United States Circuit Court for the District

of Montana, for the purpose of quieting its title as against the appellants to a certain portion of the Butte and Boston Placer, described in the complaint (Tr. p. 3). The appellants filed their answer to said complaint, denying the appellee's right or claim to any portion of the ground described included within the boundaries of the Hornet, Gulf, Olivia, Hope and Rabbit quartz lode mining claims, and claiming that at the time of the location of the Butte and Boston Placer, and at the time of the application for patent therefor, veins of quartz were known to exist in the ground, and were by the terms of the patent excluded therefrom.

On April 1, 1890, Chas. S. Passmore and Levi J. Hamilton located a portion of the ground in controversy as the Pleasant View (Tr. p. 1726), and Point Pleasant (Tr. p. 1729), quartz lode claims; and on the 16th day of April, 1891, Louis Mason acquired an interest therein (Tr. p. 1732).

On December 20, 1890, and while the Point Pleasant and Pleasant View quartz claims were valid and existing locations, Simeon V. Kemper and others located the Butte and Boston Placer, covering a portion of the ground included within the Point Pleasant and Pleasant View locations, and on May 11, 1891 (Tr. p. 1711), made application for patent therefor, which was issued Dec. 19, 1895 (Tr. p. 58, 1713).

Shortly after the application for patent of the Butte and Boston Placer was made, the owners of the Point

Pleasant and Pleasant View quartz claims commenced an adverse suit, and the matter was compromised by the quartz claimants permitting the placer applicants to take judgment and go to patent, in consideration of the placer owners conveying to the quartz owners the east ten acres of the ground included within the placer patent (Tr. p. 93).

The Gulf, Rabbit, Hope, Oliva and Hornet quartz lode claims were located by the predecessors in interest of appellants on May 1, 8, 13, 16 and 19th, 1900, respectively (Tr. pp. 88, 1742, 1745, 1738, 83), covering a portion of the ground in controversy.

The appellants contend:

(1) That the Butte and Boston placer location was void as to that portion thereof of which was included within the Point Pleasant and Pleasant View quartz locations, and that portion of the ground was public domain at the time of the location of the Gulf, Rabbit, Hope, Oliva and Hornet lode claims, and is now the property of the quartz claimants.

(2) That at the time of the application for patent for the Butte and Boston Placer, there were known lodes and veins upon the ground, which were excepted from the placer patent, and are included within the appellants' Gulf, Rabbit, Hope, Oliva and Hornet quartz locations.

SPECIFICATION OF ERRORS.

1. The District Court of the United States, in and for the District of Montana, erred in rendering and entering a decree herein, in favor of the appellee and against the appellants.

2. Said Court erred in holding and finding and decreeing accordingly that the land embraced in the placer patent for the ground in controversy was, at the time of the issuance of said patent, a part of the public domain which the Government had the power to sell and dispose of.

3. The said Court erred in holding and finding and decreeing accordingly that there were no such disclosures or evidence, as would justify a holding that there were veins or lodes, the existence of which was known prior to the application for placer patent, in any part of the ground in controversy.

4. The said Court erred in not holding and finding and decreeing accordingly that there were veins and lodes known to exist within the boundaries of the ground in controversy, to which a placer patent had been issued, prior to May 11, 1891, the date of application for placer patent to said ground.

5. The said Court erred in not holding and finding and decreeing accordingly that prior to, and at the time of the application for the placer patent to the premises in controversy, a portion of said premises was embraced in valid existing lode claims, and as to the conflicting area the patent was therefore void.

6. The said Court erred in not holding and finding and decreeing accordingly that the appellants, at the time of the commencement of said action and prior thereto, were the owners and entitled to the possession of the ground embraced within the lode claims which conflicted with the ground covered by the placer patent, and in controversy herein.

STATEMENT OF THE EVIDENCE.

LOUIS MASON, one of the appellants, testified that he is a man 50 years of age and has lived in Silver Bow County since 1887. He has had a great deal of experience in mining (Tr. pp. 68-69). To the knowledge of the witness the ground in controversy was located about the first of April, 1890, as the Point Pleasant and Pleasant View lode mining claims (Tr. p. 70). The corners of the claims were marked with mounds of stone and notices were placed at the discovery shafts. The claims were six hundred feet wide and fifteen hundred feet in length, and overlapped each other to some extent. In the case of the Pleasant View location, the discovery was about the center of the claim, and in the Point Pleasant it was near the east end line (Tr. p. 71). The notices of location of these claims were introduced in evidence and are marked Defendants Exhibits 2 and 3. (Tr. pp. 1726-1729). On the 16th of April, 1891, the witness acquired an interest in these

claims (Tr. pp. 1732-1734), and about the 17th or 18th of April, 1891, went upon the ground for the purpose of doing work (Tr. p. 73). "The first work I did was to sink a little shaft on the Point Pleasant about 300 feet east of the Boston Placer * * * and in sinking it I found pieces of copper ore, but no lead. I did not go to bed rock. The next work was about 1500 feet in an easterly and 100 feet in a southerly direction from the north side line of the Butte and Boston placer, and about 100 feet in a southerly direction from the south end line of the Copper Queen lode, and within the boundaries of the Point Pleasant location, marked on the map as No. 1. That shaft was about 4 feet square, sunk to a depth of about 14 feet, and bedrock there was within 7 or 8 feet of the surface, and from the time I struck bedrock until I reached the bottom, I had good vein matter, and I have ore from that same place at the present time taken out in 1891, from the shaft marked No. 1 on the Pleasant View. (Ore marked defendants' Exhibit 5). This cut No. 1 was examined by me before the 11th of May, 1891. The material that came out of this shaft was piled on the dump, and is of such a size that it can be readily seen for a distance of a quarter of a mile. I had two assistants, Eli Rea and Grant Pore." (Tr. pp. 73-74). He then testified that prior to May, 1891, he went about 40 feet in an easterly direction and sunk another shaft about $3\frac{1}{2}$ or 4 feet square, to a depth of 12 or 14 feet, designated on the map as No. 2. He

got to bedrock in about 7 feet, and encountered lead material as he came to bedrock, and was constantly in lead material. Defendant's Exhibit 6 came from this shaft (Tr. p. 75). Prior to May 11, 1891, he sunk a third shaft on the Point Pleasant claim, about 125 feet in an easterly direction from Shaft No. 2, which shaft was about $3\frac{1}{2}$ feet square and about 28 feet deep. The bedrock at that point was about 8 feet below the surface. He encountered a lead after reaching bedrock, and sunk on the lead about 16 or 18 feet (Tr. p. 75). Prior to May 11, 1891, he also sunk a shaft on the line between the Point Pleasant and Pleasant View lodes, known as the Hornet shaft, which was about 4 feet square and 33 feet deep. Bed rock was encountered in about 14 feet. He found copper ore in bodies all along down the shaft. The vein disclosed in the shaft extended throughout the entire shaft, and a sample of the material is marked Defendants' Exhibit 8. (Tr. pp. 76-77).

Representation work was done upon the Point Pleasant and Pleasant View quartz claims for the years 1892, 1893, 1894 and 1895.

On the 13th of March, 1895, Lee Davenport located the Lynne quartz claim (Tr. pp. 79-80), covering the same ground, and what is now known as the Hornet shaft, and which was sunk in May, 1891, was used as the discovery. At that time the vein was in sight and the discovery was easily made. (Tr. p. 77). He transferred an interest to Mr. Mason, and it was represented until 1897 (Tr. p. 82).

Samples, marked Defendants' Exhibits 8, 9 and 10, were taken by the witness from this Hornet shaft (Tr. p. 77), and in the opinion of the witness this ore exists in quantities sufficiently large to pay for operating (Tr. p. 78).

The witness further testified (Tr. p. 78): "Having in mind the discoveries upon the Pleasant View and Point Pleasant, and before I did any work on the ground at all, and having in mind the location of the ground with reference to claims contiguous to it, I would judge by the surface indications,—quartz float found all over the principal part of the ground, and the pieces of rich copper float found promiscuously over the surface of the ground and the adjoining claims on which work was done prior to the location of this ground, that there was sufficient evidence on the ground, and from the surroundings, to warrant any man in prospecting and developing the ground for quartz. As a result of the work I did there prior to May 11, 1891, I discovered well-defined leads." "The reason I did not take out the mineral from these exposures and ship it prior to 1895 is that the ground was in litigation up to that time between Mr. Kemper and his partners and myself and my partners. After 1895, when there was a settlement of that litigation, I obtained a lease and bond from my other partners, and we sank this shaft known as the two compartment shaft to a depth of forty-eight feet, and timbered it with 8x8 timbers. At that depth we encountered water and could not get

any farther, and I was not able to put up machinery; we had to quit." (Tr. p. 93). However, the witness and Mr. Merriman encountered merchantable ore in the Hornet lead in 1901, and shipped it, and Defendants' Exhibits 18, 19 and 20 show the returns from these shipments (Tr. p. 94; Tr. pp. 1752-3-4).

The compromise referred to by the witness resulted in the placer owners transferring to the quartz owners the east ten acres of the placer ground after the patent was issued (Tr. p. 93).

The witness also tested the ground in controversy for placer in 1895, and failed to find a color or trace of placer gold, and this test was made in the "discovery" made by Mr. Kemper (Tr. p. 96).

P. C. DEAN testified that he was on the ground in controversy at the time Mason was working there in 1891; went down the shafts; it was in the early Spring, perhaps prior to the middle of April, and at that time the shafts were being sunk. There was ore on the dump of the shaft now known as the Hornet, and at that time it was about 18 feet deep. The ore looked like good copper ore, red oxide and carbonate. It was a prospect that would justify any man in locating it and prosecuting work upon it. (Tr. pp. 114-115).

ROBERT MERRIMAN, a practical miner, and the person who located the Rabbit, Hope, Oliva and Gulf quartz claims, testified on behalf of the defendants:

“The ground was covered with wash, but there was some old holes there that showed the vein. The vein at that point does not come to the surface. One of those holes in which I saw the vein was right close to the Rabbit discovery, I think it was about 7 or 8 feet, and there were several others up the hill, and other workings. In my judgment there was a lead visible in those old holes. I took it for a lead. As near as I can remember, the Rabbit discovery was about 12 or 14 feet deep and perhaps 4 feet wide and eight feet long, something like that, and there was a nice looking vein uncovered, and it was of such a character that a reasonable miner would be justified in locating the ground and prosecuting work there as mentioned, in the development of the property.” (Tr. p. 136). The witness also testified: “I made a discovery upon the Gulf claim. The reason that *I located that point for a discovery was that the same old workings showed a vein there where I concluded to make this Gulf discovery.* It seemed to me that the Gulf and Hope shafts are about 12 or 15 feet apart. The Gulf discovery was about 4 feet by 8 feet and something like 14 feet deep, I think. *We got some merchantable copper ore out of the discovery, some of which we shipped. I got something over two hundred dollars for the ore that I got out of that hole, which possesses the dimensions that I have just given. The character of the ore was green chloride and I encountered a lead in that discovery.* The indications were such that a reasonable

miner would be justified in locating the ground and prosecuting work there." He also made a discovery in the Hope and Oliva claims. He testified that the reason he expected to find a lead in the Oliva discovery was "there was a lead exposed in some old workings that had been thrown out" and in sinking the shaft they discovered a lead that was covered in the old workings. (Tr. pp. 136 to 139.)

He continued to work the property until he was enjoined. Tunnel 34 was run by him so that he could take out the ore without hoisting it through the Gulf shaft. "We drove that tunnel quite a way in slide before we got to the lead. After striking the vein, we followed it something like 150 feet north. We took out of the tunnel merchantable copper ore and shipped it, and the returns more than paid the expenses involved in getting it out." (Tr. p. 139.)

"There were lots of dumps and holes on this ground when I became acquainted with it in 1900, and there was ore on a great many of the dumps." (Tr. p. 140.)

"In my judgment the lead that I followed in this tunnel (34) was a well-defined lead. It has one good wall that we followed all the way with the tunnel. My observation of it was that the course of the lead was a little south of east and north of west; where we found it the course was regular." (Tr. p. 141.) "Passing to the lead in the Point Pleasant ground,—the upper lead,—I went into one of those old openings in 1900 and in that opening I saw a quite well defined lead. That opening would be somewhere close to the Rabbit dis-

covery.” (Tr. p. 143.) “Along this placer ground I think that all the openings that I have spoken about on the northerly lead encountered the same lead in this course east and west; that is the way it looks to me; I should judge that all the openings and tunnels about which I have testified, on the southerly lead, were on the same vein. To my knowledge in 1900 there were two veins in this placer ground running east and west.” (Tr. p. 143.)

There was no placer gold in the ground (Tr. p. 147).

P. A. STEVENS, testified: That he was familiar with the ground in controversy, and has also worked adjoining ground. He operated the Bullwhacker and shipped approximately ten thousand tons of ore which paid expenses and yielded a profit (Tr. pp. 153-4). He did not know of any placer mining operations being carried on within a mile of the ground in controversy (Tr. pp. 154 and 167).

“The miner is generally able without uncovering the lead for its entire length, to determine the strike of it by the openings where there are tunnels or shafts. By taking the course of the veins through the bottom of each hole, and lining up the holes on the surface, is generally the way I tell if a lead exists between those openings where they are 50 or 100 feet apart. I do not know of any mines in this district where the lead has been uncovered throughout the entire distance of 1500 feet to determine its strike. There is a measure of regularity in the strike of a lead.” (Tr. p. 155.)

The witness testified that he examined shaft No. 1, the Rabbit, and in his opinion a lead was exposed there. The streak of ore lying in the bottom enabled him to determine the course of the lead, which is easterly and westerly. He procured a sample of the lead matter, which was received in evidence as Defendant's Exhibit 30. (Tr. p. 156.) He also examined shaft No. 2, and found in that shaft the evidence of a lead, having an easterly and westerly strike, the same as in shaft No. 1, and obtained a sample from there, which was received in evidence as Defendants' Exhibit 31. He then examined the Rabbit discovery. He made an examination of that shaft and ascertained that there is a lead in the bottom of that shaft, and procured a sample, received in evidence and marked Defendants' Exhibit 32. (Tr. p. 158.) He then went to shaft No. 9, a two-compartment timbered shaft. He encountered the lead in the cross cut, and the lead contained commercial ore; ore that would pay to ship; the body of ore was three or four feet wide. He took a sample of the vein from the solid formation, which was received in evidence and marked Defendants' Exhibit 33. He then examined the Rabbit tunnel, marked No. 31, and found a lead of ore exposed in the crosscut running north; its strike could be seen very plainly and was easterly and westerly, and in the main tunnel he also saw the same lead, and followed the lead for a distance of thirty or forty feet on its course east and west. He took a sample of the lead matter, which was received in evidence and marked Defend-

ants' Exhibit 34. (Tr. p. 159-160.) He also encountered a lead in the Hornet tunnel, which was continuous for a distance of about 100 feet, and he there saw a well-defined foot wall. He went down the Hornet shaft and saw the lead there, and also the hanging wall (Tr. p. 161). From these leads he took samples, which are marked Defendants' Exhibits 35, 36, 37, 38 and 39 (Tr. pp. 162-164). He then went on the surface, and from his examination, and lining up the several openings, it was his opinion the several veins exposed constituted the same lead (Tr. p. 165).

H. J. MASON testified for the defendants to the effect that he became acquainted with the ground in controversy in April, 1891. He visited the ground at that time when his brother, Louis Mason, and others were working upon the Point Pleasant and Pleasant View locations. "When I went upon the ground in the first place I knew of the existence of two quartz locations on the ground there known as the Pleasant View and Point Pleasant locations. With reference to the two leads,—northerly and southerly,—I noticed a shaft probably twenty feet deep on the northerly edge of the land on this northerly lead so called. The other was a shaft probably a little deeper on the south side of the ground near the south line. There were three shafts on the ground when I first visited it that I know of. There might have been more, but I know there were three. One was on the northerly lead and one exposed ore on the southerly lead. I did not notice

any ore in the other, it was far down the hill. I noticed that that shaft that I saw there in 1891 was still in existence when I was out there yesterday. It was in an advanced condition yesterday from what it was when I saw it before. It has been timbered up. When I was on the ground in 1891, the men were working this lower shaft at the lower part of the ground. There was nobody working on this shaft on the northerly lead when I was there the first time. There is quite a little dump around that shaft and it was of such proportions that any person going upon the ground and using his eyes could readily see it. In that shaft I saw green copper ore, red oxide of copper, and copper and such rock as could be called lead matter." (Tr. p. 183.) "Coming to the south lead, I saw men working just a little below, farther down the hill, west of the Hornet shaft. The Hornet shaft was in existence at the time, that is prior to May 11, 1891. There were two men working at that shaft at that time. There was considerable of a dump at that shaft and on it I saw evidence of mineralization in the form of copper ore, quartz, red stain, and iron quartz. At that time I went down in the Hornet discovery for the purpose of determining whether there was a lead exposed and I saw what I could call a lead on the north side of the shaft near the bottom and also on the west and east sides of the shaft. Noticeable characteristics of the lead or the matter that I saw there was the green copper and the red oxide of copper. *There was also*

some sacks of ore that they had sacked up laying on the dump and also ore scattered over the dump that they had taken out. I examined the ore in the sacks to determine if it were merchantable and found that it was very good ore,—commercial ore. Those sacks were plainly visible to anybody who wanted to see them.” A reasonable mining man would be justified in locating the ground and spending money in its development. (Tr. p. 185.)

SAMUEL T. JONES, a practical miner, testified for the defendants as follows: “I was first on the ground prior to the 11th of May, 1891. There was work being done there at the time. * * * There were two or three openings upon that ground before the first of May, 1891. I think about three shafts were being sunk at that time (Tr. p. 197). These shafts were sunk on what has been referred to as the north lead. I believe that there was one shaft being sunk on the southerly lead, known as the Hornet discovery lead, down beyond the west side of the ground. There were men working on the ground about the first of May when I was down there. I went out there pretty nearly every day, for three or four days. * * I went down into the so-called Hornet discovery and saw evidence of a lead there. It was good looking copper ore to me. They had some ore sacked up on the dump on the Hornet discovery, and in the light of my present knowledge of ore I would say that the ore

in the sacks was commercial ore. This ore in those sacks was prior to May 11th, 1891."

ERNEST WATSON, a mining engineer, testified for the defendants, that he had made an examination of the ground in controversy, and as a result of his examination and observation he would say there are two leads upon the ground. For the purpose of reference and identification, he called them the northerly and southerly leads (Tr. p. 205).

He testified that in the north cross-cut of tunnel 31, there is a lead, which he encountered about 20 feet from the point the cross-cut leaves the tunnel. Since he first visited the ground, the cross-cut has been extended about six feet, which extension shows ore for nearly its entire length (Tr. p. 206). He took a sample from this lead which assayed 10.9 per cent. copper for a width of one foot. "There is a foot wall shown there, and I would not say there is a hanging wall because the face is yet in ore." He also obtained a sample from the same place, and within the foot streak which he had assayed, which was introduced in evidence, and marked Defendants' Exhibit 40. He termed it chrysocolla with some carbonate or malachite in it, and stated that it is the character of material one would encounter in the oxidized zone of copper leads. The sample is rich in copper ore. (Tr. p. 207.) And at page 208 he testified: "I did not take a sample of the material disclosed in the new work (referring to the extension

of the north cross-cut of tunnel 31), but its character would compare favorably with the sample I took before Defendants' Exhibit 40). I would say that the foot wall is continuous in that cut as I saw it to the end of the cut, that is, it is not one solid body, but it is more or less broken up, with stringers of ore. I would say that in its entirety it is lead matter. The entire lead shown probably assays very little less than ten per cent. The entire body as it exists there in that cut I think is commercial ore." (Tr. p. 208.)

"Proceeding from this tunnel 31, the ore showed continuously on the north side and in the bottom of the tunnel where it is left, until you get 57 feet from this north cross-cut, there is a north and south fault comes in there." (Tr. p. 209.) "Going further beyond this fault in tunnel 31 until you get to the cross-cut going south, here at that point the lead is in evidence again. There is a little projection next to the face of the tunnel. On the north side opposite that south cross-cut, one could obtain a sample at least $2\frac{1}{2}$ feet wide. * *

After leaving this tunnel, I went to the Rabbit discovery shaft. This is a shaft 11 feet deep and at the bottom of that a drift runs in about three feet from the west. I found evidence of the existence of a lead in that shaft. I took a sample of what ore was shown there. The strike was from three to six inches wide. It went 7 1-10 per cent. * * *

The drift runs to the west showing a streak of ore 36 inches wide, all good ore that will go as high as seven per cent. cop-

per. It is the same vein." (Tr. pp. 210-211.) He also testified that he went into shaft No. 1, as shown on Defendants' Exhibit 1, in which he found a sort of disintegrated altered granite, and a quartz-bearing seam, which suggested a lead to him as a geologist. He found similar conditions in shaft No. 2. He also entered shaft No. 9, the timbered shaft, and the lead is exposed in a cross-cut to the north from that shaft (Tr. pp. 211-212). He visited the Hornet shaft and found ore that would go as high as $9\frac{1}{2}$ per cent. copper, and took samples which were received in evidence (see Defendants' Exhibits 42 to 52). In the judgment of the witness the lead disclosed in the Hornet discovery is the same lead that he encountered in the cross-cut in the tunnel. (Tr. p. 221.)

EVAN P. CLARK testified as follows: That he is a practical miner, and that he has known the ground in controversy since 1901. That he never knew of any placer being carried on there (Tr. p. 295). That he examined shaft No. 1, and found a lead there with an easterly and westerly strike. He also visited the Rabbit discovery shaft and found a lead there with an easterly and westerly strike. He also saw a lead in the cross-cut from No. 9 shaft containing copper ore (Tr. p. 296). In the openings he examined he stated there is all the evidence necessary for a practical miner or prospector to make a legitimate location for quartz, in either one of the exposures. He went into

tunnel 31, and found plenty of commercial ore there, in both large and small bodies. As conditions exist there now (referring to tunnel 31), including everything between those two different streaks, there would be eleven or twelve feet of ore. * * * "That entire body, for its entire width, is of such a character that I would ship it all. The course of that vein is easterly and westerly; as to its dip, it stands fairly straight, leaning, I should judge, a little to the north. We come to that ore again about 35 feet in, where the course of the tunnel cuts the ore streak on its course. There is about 10 feet of ore there, that is a rough estimate. * * * The ore body that we encountered in the tunnel is one and the same ore body that we encountered in the cross-cut. Beyond that and approaching the face of the tunnel, there is ore all the way." (Tr. pp. 297-8.) He also visited the Hornet discovery shaft, and found evidence of a lead containing copper (Tr. p. 299), and the indications were such that he as a reasonable mining man would be justified in locating it and expending money in its development (Tr. p. 300).

WILLIAM MAYGER testified that he had been living in Montana since 1864, and had been engaged in mining all the time, and is at present manager of the St. Louis Mining and Milling Company at Marysville (Tr. p. 349). He visited shaft No. 1, and found

it cut by a number of stratas of quartz, going down almost vertically. The appearance was such that a reasonable mining man, in the exercise of ordinary judgment, would be justified in locating the ground (Tr. p. 350). He found the same indications in shaft No. 2, and the strike of the lead was apparently the same, easterly and westerly. He found the disclosure there of such a character that he as a reasonable mining man would be justified in locating the ground and prospecting it. He went into tunnel 31, and found strong evidence of a fissure passing through the back of the tunnel. About ten or twelve feet from the end of the cross-cut running to the north, he found a strong vein of copper stained ore, commercial ore. (Tr. p. 353.) He also visited the Vesuvius discovery, which disclosed quartz, carrying copper, a sample being marked Defendants' Exhibit 60. It is his judgment that the lead found in shafts 1 and 2 and in the tunnel are one and the same vein (Tr. p. 357).

H. A. BOWMAN stated that he had lived in Montana off and on since 1885, and qualified as a practical miner and mill-man (Tr. p. 433-434). He made an examination of the ground in controversy and found two leads traversing the ground (Tr. p. 434). He examined shaft 21, and found the whole bottom of the shaft covered with ledge matter (Tr. pp. 434-5). He also found good indications of a lead in the face of the south cross-cut from tunnel 30. He did not go into

shafts 1 and 2 (Tr. p. 435). He found a vein in the face of the north cross-cut from tunnel 31, and in his opinion the wall of the vein is exposed. When he first visited this cross-cut, the face of the cross-cut was all in ore; there was at least a foot of it. Since his first visit the cross-cut was extended, and the cross-cut is now well mineralized for a distance of nine feet from the point where the ore was first encountered. There is now a lessening of mineralization as you proceed toward the face of the cross-cut; the face of the cross-cut is now in granite (Tr. p. 436). The lead appeared to be running in an easterly and westerly direction. Some of the ore was commercial ore. Defendants' Exhibit 66 is a fair sample. (Tr. p. 441.) The south cross-cut from this tunnel showed barren country rock. He encountered the lead which he saw in the north cross-cut again on the north side of the tunnel, 33 feet east of the north cross-cut. There was about a foot of it exposed there for a distance of 20 feet (Tr. p. 437). The vein was again visible at the face of the tunnel. (Tr. p. 438.) He saw a stringer of ore in the Rabbit discovery from 4 to 6 inches wide; it had an easterly and westerly course. He also found a good showing of a lead in shaft No. 9 (Tr. p. 438). He would like to find as good government land he could locate himself for quartz (Tr. p. 439). In his opinion the material he encountered in all these openings from the Vesuvius discovery to tunnel 31 would be one and the same vein. (Tr. p. 440.)

lead in the tunnel itself. He found a streak of ore in the north cross-cut from this tunnel a foot wide. It was very good copper ore and would pay to ship. The width of the lead there was sixteen or seventeen feet (Tr. pp. 507-8). The lead also was disclosed in the drift, about thirty feet from the cross-cut. (Tr. p. 508.)

He visited the Rabbit discovery, and found especially one streak of good copper ore. In his judgment all of these different openings disclosed the same lead.

He examined the Hornet shaft on the southerly lead, and found a lead disclosed in the shaft from a little above the tunnel or cross-cut clear to the bottom of the shaft. He obtained samples for the purpose of having them assayed (Tr. p. 510), and Defendants' Exhibit 71 is the return he received (see p. 1759). See also Defendants' Exhibit 72 (Tr. pp. 532-3, and Tr. p. 1760).

There was also a very good lead disclosed in shaft No. 19 (Tr. p. 511).

The evidence of a lead disclosed in all of these workings was such that he as a reasonable mining man would be justified in locating the ground and spending his money in its development (Tr. p. 512).

LLOYD G. GAGE, a civil and mining engineer, testified as follows, referring to shaft 21, on Defendants' Exhibit 1: "I found rock in place in the bottom. The material in the bottom of that shaft is

either a vein or a dyke. There is no difference between a vein and a dyke, in the legal sense, so far as I know. In a geological sense I know there is a difference, but I am not a geologist. The dyke is brought there by a molten condition, and the vein is either from altered rock or it is altered rock, some way or other brought there in solution or decomposition. The reason I say there is no difference in a legal sense is that there are veins that carry values and there are veins that carry no values. The same is true of dykes. And to make a valid location you must have rock in place, containing ore, or containing a valuable metal, so you can locate a dyke or a vein as a quartz lode claim. I am not enough of a geologist to tell whether that is a vein or a dyke there, although there is rock in place. I say there is rock in place there carrying minerals to distinguish it from the wash. I know it carries minerals because I had a piece assayed. I could not tell from an eye inspection of it whether it carried minerals. I got the sample that I took to the assayer on the west side of the shaft, near the bottom. I took two separate samples, one maybe two feet from the north edge of the shaft, and one maybe two feet from the south edge of the shaft, *and in taking these samples I took the most unlikely rock I could find, because I wanted to see if the poorest of it contained any copper.* After taking these samples I took them to an assayer, Mr. Febles; he is the assayer for the Anaconda Mining Company. I got a return from him as to what these

On the southerly lead, he went into shaft 19. He found a well mineralized lead there, wider than the shaft. Tunnel 36 showed numerous stringers of quartz, which looked favorable as the capping of a vein (Tr. p. 441). Tunnel 37 also disclosed mineralized rock with good indications of a lead, and in his judgment it is a portion of the lead. (Tr. p. 442.) "I made an examination of the Mullins tunnel and the cross-cut from the tunnel to the Hornet discovery. I have been in there nearly every day, and have been out there 8 or 9 times. There is a lead disclosed there. I find it in all that work in the Mullins tunnel, that cross-cut south, and in the Hornet shaft; that is all one lead." (Tr. p. 442.) In his opinion all these openings on the southerly lead constitute the same vein (Tr. p. 445). He obtained Defendants' Exhibits 67, 68 and 69 from the workings of the Mullins tunnel as proof of his theory that it is all the same vein.

PAT MULLINS, a witness for the plaintiff, testified that he was familiar with the Pleasant View location (Tr. p. 464). He made an examination of all of the discoveries upon the ground and there was no vein disclosed in any of them. And yet, although he made the examination of these workings for the very purpose of purchasing an interest, he paid several hundred dollars for an interest in the ground, and knowing at the time that it was involved in litigation (Tr. pp. 469 to 470).

JOHN STAFFORD testified that he had followed mining for about forty years, and about twenty-four years in Butte. He first became acquainted with the property in controversy in 1903; he made an examination of the openings there at that time. He sampled the so-called hanging wall of the Mullins vein, and found it contained good values in copper (see Defendants' Exhibit 70), (Tr. p. 504).

At that time in 1903 he went into the Hornet discovery. He saw some very good ore there at that time, on the north side of the shaft. (Tr. p. 505.)

Upon a recent examination he went into the deep shaft No. 21 on the northerly lead. He found very good lead material, ledge matter and vein matter in there, in the bottom of the shaft, and also for a distance of about five feet up the shaft. He also found the same lead in the tunnel to the east (Tr. pp. 505-6). He went down shaft No. 1 and found good evidence of mineralization there. "There is a streak of quartz running east and west about ten inches wide * * * then there is another streak more to the north, running east and west. * * * As a mining man, with my experience, I would say that is vein matter. There is enough disclosed there so that I could determine the strike and dip of that lead. The strike is east and west, and the dip is a little to the north." (Tr. p. 506.) He found the same evidence of mineralization in shaft No. 2; the same lead material (Tr. p. 507). He then visited the Rabbit tunnel—tunnel 31. He found a

samples contained." (Tr. p. 544.) He examined shafts 1 and 2 on the northerly lead. No. 1 contained granite, and No. 2 aplite. The granite was decomposed, with seams in it; it had an east and west strike. Some of the material in each of these shafts was vein matter. (Tr. p. 545.)

Testifying with reference to the cross-cut north from tunnel 31, he stated: "*For twenty feet in that north cross-cut I found no specks of coloring of copper at all, looked like absolutely barren granite, and then came into what they called chrysocolla.* The total length of that cross-cut is thirty-seven feet, and the ore goes to within a foot of the face; at least twenty feet there was no ore. There would be approximately fifteen feet of the vein exposed containing chrysocolla. I do not know whether all of that is commercial ore, but a whole lot of it is. The twenty feet I said I went through barren granite, I would call country rock. In this lead that is exposed in this cross-cut, I think I saw what might have been the hanging wall within a foot of the face; I saw the foot wall about twenty feet in from the tunnel. The strike of the lead was easterly and westerly. The dip was northerly." (Tr. pp. 545-546.) "Going easterly from the mouth of that cross-cut, when you come to the bend of the tunnel, you run into the lead again, and the tunnel follows the lead from that point, I think, into the face." (Tr. pp. 546-547.)

"I went into the Rabbit discovery shaft. It may be

twelve feet deep, untimbered, and now there is a little drift at the bottom of it running westerly. It is run approximately three feet from the bottom of the shaft. I found evidence of a lead there; I found this chrysocolla with an easterly and westerly strike. There was no large body of it; it was rock in place." (Tr. p. 547.)

"I went into shaft No. 9. No. 9 shaft is in vein material. There is a cross-cut north, half way down the shaft, and that discloses vein material likewise." (Tr. p. 548.)

"I also went into the Vesuvius. * * * Both the cross-cut north and the cross-cut south from the Vesuvius shaft show stringers of chrysocolla and have a northerly dip and an east and west strike. Those stringers are an inch or two wide; there are a great many of those stringers in the cross-cut; they are probably all one vein." (Tr. p. 548.)

In the judgment of the witness, a reasonable mining man would be justified in locating the ground with shaft No. 1 as a discovery, with the expectation of finding a mine and developing the property; he would likewise be justified in locating shaft No. 2 in the same manner. A reasonable mining man would also be justified in locating the ground with the mineral showing in shaft No. 9. (Tr. p. 549.) And in the judgment of the witness, the openings on the northerly lead are on the same lead (Tr. p. 549).

The witness found rock in place in shaft 19 containing copper. The openings in tunnel 36 showed de-

composed granite, and stringers of what have been termed aplite or quartz; there were little stringers of aplite or quartz all through this ground. The existence of the quartz there would indicate a vein. (Tr. p. 550.)

"I went into tunnel 34. The tunnel is in wash for approximately 35 feet and from that point or a little farther in, it follows a lead clear to the face." (Tr. p. 551.)

CLINTON C. CLARK, one of the defendants, testified as follows: That he made an examination of the ground in 1901, and at that time the Hornet tunnel was run in to its present distance. At that time you could see the ore in three sides of the shaft. He examined it at that time (Tr. p. 584). The Gulf discovery was there also at that time (Tr. p. 584). On the northerly lead, the timbered shaft was there, the Rabbit discovery, and several other holes at that time. (Tr. p. 585.)

The witness worked the Pacific claim adjoining the ground in controversy, to a depth of at least three hundred feet, and found no such character of mineralization as in the ground in controversy. The "hundreds of acres" to which Mr. Winchell testified, did not extend that far.

The witness has known the ground in the immediate neighborhood since 1881, and no placer mining was ever done on the ground in controversy. The witness carried water out there from town and had half a dozen

experts pan the ground thoroughly in several places, and could not find a color of placer gold. (Tr. p. 589.)

At the time he worked the Pacific he made shipments of ore which went 15.5 per cent copper. He operated the Pacific in 1901 and 1902 (Tr. p. 590).

The witness examined all of the openings on both leads, and the indications were such that as a practical miner he would locate the ground and spend his money in its development.

JOHN HOYLAND, a witness in a former action involving the same ground, testified that he knew what is called the Hornet shaft. He was living out there in 1891, about half a mile distant. He saw sacks of ore at the collar of the Hornet discovery shaft in May 1891; that was about the 6th or 7th of May (Tr. p. 659).

ELI REA testified that he was familiar with what is known as the Point Pleasant and Pleasant View quartz claims in 1891; that he was employed by Mr. Mason during the latter part of April and the first of May of that year in sinking shafts on these two claims. He commenced work about April 20 and worked until about May 19th of that year. On one of the claims they dug two holes about twenty feet apart, and at a depth of about eighteen feet they struck a solid body of copper ore, covering a good part of the hole. He took samples at that time as keepsakes or souvenirs. (Tr. p. 662.)

SAMUEL BARKER, a mining engineer, testified as follows: That he has known the Butte and Boston Placer ground since 1888, and in the practice of his profession he has crossed it innumerable times since 1888. No placer mining operations were ever carried on within the boundaries of the Butte and Boston placer to his knowledge since 1888, and the nearest placer operations to the knowledge of the witness was at least a mile to the southwest. (Tr. p. 678-9.)

The witness testified that he is familiar with what is known as aplite, and in his examination of the ground in controversy he saw some aplite. "It does not constitute the general bulk of the country rock there. The gray granite is there in greater quantity than the aplite. At the surface it is wash out there, that has been carried down from the steep hillsides to the east. In the solid rock, it is every conceivable dip and direction. The bands, if you might so term them, of aplite, are generally small. They differ in color underground from the gray granite. The gray granite was there first and the aplite has been intruded into the granite." (Tr. p. 688.)

"In some portions of this district veins have walls or boundaries; in other portions not. Now, for instance, to the west are silver veins and the walls are in most cases well defined, but you take it in the copper district no well-defined walls are found in a great number of the mines that are being worked at depth. That is due to the mineralization of the granite by

replacement by copper solutions, or by solutions containing copper and other metals." (Tr. pp. 688-9.)

The witness testified that he had a very intimate acquaintance with all of the ground surrounding the ground in controversy, and having in mind the mineralization encountered in the cross-cut from the Mullins tunnel to the Hornet discovery, he stated there is not hundreds of acres of ground in that vicinity mineralized in that way. (Tr. p. 696.)

His definition of a vein is: "A vein is mineralized rock in place such as would justify one in spending time and money in prospecting the same." (Tr. p. 696.)

"In my examination of the ground here I have found evidence of leads traversing this ground. I found at least two veins. The north vein traverses the northern portion of this Butte and Boston placer, and its strike is very nearly east and west, a little bit I should say north of west. It has a peculiar characteristic in that it dips to the north. Most of the veins in the Butte camp dip to the south. The south vein I find in the Hornet tunnel and the various workings therefrom, or tunnel 34, shown on Exhibit 1; that has a northwesterly strike and dips to the south." (Tr. pp. 696-7.)

"Taking up this northerly lead and referring to shaft 21, I find there iron oxides, altered granite,—that is, altered country rock,—clay, some minute particles of quartz, and I also found direction for some small seams which I think are iron oxides, the direc-

tion being easterly and westerly and with a northerly dip. I SAY THERE IS A VEIN THERE. THERE IS ABSOLUTELY NO QUESTION OR DOUBT IN MY MIND ABOUT IT." (Tr. p. 697.) He also found evidence of a lead in the south cross-cut from tunnel 30 (Tr. p. 697). "I find a vein in shaft No. 1. It is a very small vein dipping to the north, and has a northwest strike. I obtained a sample of the material I found in shaft No. 1." (Sample marked Defendants' Exhibit 77), (Tr. p. 699.) "There is sufficient of the lead in shaft No. 1 to determine its strike. There is at least three feet in length of this vein shown on this strike. You find the granite on either side of the vein, but they are not smooth, slick walls. The mineralization there is irregular, but it has a dip and strike." (Tr. p. 699.) The vein evidences are such that it would justify a reasonable mining man in locating the ground and developing it. "There was sufficient exposure of the lead in shaft No. 1 so that I could tell the dip. I saw it for a vertical depth of 6 or 7 feet at least. I remember I had to climb up the shaft to see the end of it. The dip was about 85 degrees to the north." (Tr. p. 700.) "I found excellent veins in the north cross-cut from tunnel 31. * * At 23 feet from the center of the tunnel, I found a small streak, one or two inches wide, dipping to the north. * * * At 26 feet I find the footwall of the vein. I find 15 inches of excellent vein material, better in fact than ninety-nine in a hundred of the claims

I have seen or examined or located. At thirty-three feet, I find another seeming wall, but I think it is a portion of the same vein. * * * I should call it quite a wide vein. I think the two rich streaks there are merely in the same lode. I did not take a sample and have it assayed, but from my knowledge I would say it is commercial ore." (Tr. p. 702.) "From the examination of the mineralization disclosed in that cross-cut, and I looked at it very carefully indeed, the mineralization does not disappear rapidly from the top of the cross-cut to the bottom. I heard the statement made by Mr. Winchell with reference to that. I thereafter made an examination, making that one of the particular things to look at, and instead of that, I find the vein mineralization as great at the bottom as it is at the top." (Tr. p. 703.) "I was able to determine the strike of that lead as disclosed in the cross-cut. I took the strike of the footwall and I took the strike of the mineralization. * * * The footwall I found to have a strike of south eighty degrees west, dipping eighty-five degrees to the north." (Tr. p. 703.) "Both the hanging and foot walls are granite on each side of this vein. The vein itself is so terribly green that any one could see where either wall would be." (Tr. p. 704.) "Leaving this cross-cut and going farther into the tunnel, you encounter this lead again where the tunnel takes its northeasterly direction, and where it has a north 67 degree east strike. That is about 37 feet from the north cross-cut. I find the fault in the

back or roof of the drift, and down for some little distance, but the vein is dislocated near the bottom, where you can see this fault material coming in contact with it. You can trace the vein east from that point a distance of 15 or 20 feet, maybe 25 feet; then it is intercepted by a fault which has a northwesterly and southeasterly strike, dipping to the east. The vein is found on the west side of that fault up to where it is intercepted by the fault plane on the east side of the fault." (Tr. p. 705.) "The true strike of that vein is north 85° west." (Tr. p. 706.)

Defendants' Exhibit 82 was obtained by the witness from the point in tunnel 31 where the vein is first exposed by the tunnel east of the cross-cut, showing it contains copper. The witness testified: "One of the real reasons why I brought that sample was to show what Mr. Winchell calls the interlocking of quartz crystals in veins. Mr. Winchell said that that vein was entirely aplite. I say that it is typical vein quartz, interlocking exactly as Mr. Winchell said it would in real veins." (Tr. p. 707.)

"The small cross-cut running to the south, near the face of tunnel 31, shows more or less of this same discoloration, and a small streak of very highly mineralized material, containing cuprite and chrysocolla. Its dip was to the north, and the strike easterly and westerly. There is no connection there now between this and the lead I observed in the first cross-cut to the south. It will will require further work to prove the

continuity of these several streaks. I also made an examination of this cross-cut to the south, a little east of the cross-cut to the north. I heard Mr. Winchell say there was no aplite in that cross-cut to the south. My first notes made on the ground showed that there was aplite there, and I went back to look at it carefully, and there is a great deal of aplite there. He said he counted as many as fifty, and then stopped, of little harder streaks in the granite, but he said there was no aplite there, and thought that was 20 to 25 feet below the wash. The wash is shown in the top of that drift, and there is a great deal of aplite there. That is the reason I made another examination of it. The aplite appears there intrusively. You find the granite on top of the aplite. The aplite is an intrusive sheet there. It is nearly horizontal." (Tr. p. 709.) "I went into the Rabbit discovery. I found a vein there. It was dipping to the north, and the strike was a little to the northwest (Tr. p. 710). * * * I traced that lead by the work I did there across the bottom of the shaft. *In the sinking of that shaft there, the lead would be exposed.*" (Tr. p. 710.) "I also went into shaft No. 9. In the cross-cut north from this shaft, at the 25 foot point, there is a vein exposed." (Tr. p. 711.) Defendants' Exhibit 85 was taken from this vein. The witness was of the opinion that the leads disclosed in the several openings are one and the same lead (Tr. p. 713).

"With regard to the southerly lead, and the evidence

of mineralization in the Hornet discovery shaft,—immediately before bedrock was encountered, I find on the north side of that shaft, a small streak of high mineralization, containing cuprite and chrysocolla. That streak has an easterly and westerly strike and a dip very flat to the north. *That streak will, on its dip, go into and become a part of what is called the Mullins vein.* Farther down in the shaft, I find at least two other of those same highly mineralized streaks having an easterly and westerly strike and the same northerly dip. At the bottom of the shaft I find the brown material, which is good vein material, dipping to the north * * * with a flat dip to the north * * * and having an easterly and westerly strike. The shaft itself, where exposed now, is quite green,—that is, there has been mineralization or replacement in the granite. I say that these rich streaks, having a trend to the north (Tr. p. 717), become a part of the Mullins vein, because it is almost continuous, excepting for the slight break between the Hornet tunnel cross-cut and the cross-cut at the bottom from the Hornet discovery,—shows that it has an east and west strike and flat dip, and does go over and join onto the vein that has been talked about here and called the Mullins vein. I first encountered this mineralized streak in the shaft within six inches of the point where the wash and the solid country rock is encountered. As to the mineralization on the north side of the shaft being continuous, the same kind of material exists from

the point where bedrock is reached to the bottom of the shaft, except for these richer streaks. I should say that the material was well impregnated, well replaced with copper, because I took a sample beginning at the bottom of the Hornet discovery shaft along both the east and west sides of the cross-cut northeasterly therefrom, and I got a very fair assay from that material.

* * * I might say, in taking this sample, I was very careful indeed to exclude every piece of this highly mineralized chrysocolla and cuprite that you find encountered in this north cross-cut. In fact, I took the worst material I could find. This sample was taken from at least 18 feet north and south,—that is, from the north side of the Hornet discovery shaft, up to within a foot of the vein that is shown at the north end of that cross-cut. (Tr. p. 718.) “The returns given me by Mr. Hocking (the assayer) are three-tenths of an ounce in silver and seventy-one hundredths per cent. in copper. I also took a sample of the brownish streak that I found in the bottom of the Hornet discovery shaft and west therefrom, and took it to Mr. Hocking and had it assayed. I obtained that sample by thoroughly cleaning off the material there, and picking off the surface, and then taking a sample underneath that, so that I would have the material only from this streak, and it was taken for a distance of four or five feet in an easterly and westerly direction. None of this chrysocolla was visible where I got this sample No. 1.” (Sample marked Defendants’ Exhibit 80), (Tr. p. 719.)

Having in mind the mineral conditions in the Hornet discovery as they were disclosed in that shaft, if a man did not locate it, I should say that he was not in his right senses. That is one of the nicest showings I have seen. (Tr. p. 719.)

I would also say that a man would be justified in locating the Rabbit discovery upon the showing there (Tr. p. 720); and he would certainly be justified in locating the ground with the exposures as they exist in shaft No. 9 (Tr. p. 720).

Referring to the Mullins vein, the witness testified: "I do not think that the walls of the lead there bounding that lead are the true walls of that vein; or that the northerly and southerly boundaries of the Mullins shaft are not the footwall or the hanging wall of that lead. I say that because I can find better ore either on the foot or hanging side of that streak, and going down into the drift on this same streak below, I can find just as good ore outside of the well-defined wall as I find inside. The whole of the material between the Hornet discovery shaft and the tunnel to the north is mineralized and I should say it was a vein; it is the same vein; the mineralization came from the same source." (Tr. p. 723.) Defendants' Exhibit No. 93 was taken from the so-called footwall of the Mullins vein (Tr. p. 724).

CHAS. E. KINMAN testified that he has known the ground in controversy for thirty years, and during

that time no placer mining work has been done upon or adjacent to it (Tr. p. 851). He saw two veins traversing the ground, one known to him as the Hornet and the other as the Rabbit (Tr. pp. 854-855). He visited shaft 21 on the Rabbit lead. The bottom of it was all vein material. He visited tunnel 31, and in a cross-cut to the south he saw a vein exposed 15 feet in width (Tr. p. 856); he also found more of this brown quartz in shaft No. 2 (Tr. p. 857). In the north cross-cut from tunnel 31, he found two streaks of copper, one about a foot wide, and the other about two and a half feet wide. He saw a vein there and measured it; it is 37 feet wide. The foot wall of this vein was in the tunnel, and the hanging wall was in the breast of the north cross-cut. He went into the Rabbit discovery and found a lead there, containing a streak of green copper about six inches wide. Shaft No. 9 was all ledge matter. He found evidence of a vein in tunnel 35, and lots of vein material in tunnels 36 and 37 (Tr. pp. 860-1). He found that the Hornet discovery contains a vein with shipping ore (Tr. p. 862).

DANIEL J. WILLIAMS, the engineer for the East Butte Copper Company, which owns the ground directly to the west of the ground in controversy, testified that the veins in the East Butte ground do not come to the surface, and they are covered with a deep deposit of wash. That one of the principal veins in

their ground, the Donner vein, has been opened up for a distance of about three thousand feet, and has been exploited to within four hundred feet of the ground in controversy, and at that point the vein was still strong. All of the veins in the East Butte ground have an easterly and westerly strike. In the opinion of the witness the Donner lead is the same lead as exposed in the tunnel on the ground in controversy. (Tr. pp. 891-896.)

LOUIS MASON testified that he sunk shaft 21 in the Summer of 1911, and that he determined the point of location of the shaft by putting a stake between the Rabbit discovery and shaft No. 9, and set another stake over the north end of the north cross-cut leading north from the Rabbit tunnel,—tunnel 31, He sighted from the stake between shaft No. 9 and the Rabbit discovery and the stake at the end of the cross-cut, or tunnel 31, and sunk the shaft (Tr. p. 917). The entire bottom of the shaft, from the time he struck bed rock, was in vein matter (Tr. p. 918).

ANDREW G. RAY, the foreman of the East Butte Copper Company, testified that he was familiar with what is known as the Donner vein in their property; they have opened it up for a distance of about three thousand feet in an easterly and westerly course (Tr. pp. 938-9), and if it continues its course beyond the ground owned by their company it would go into the

ground in controversy (p. 941); and SAMUEL BARKER testifies to the same effect (Tr. p. 951 et seq.).

ELLIOTT H. WILSON, a witness for the plaintiffs, testified that he made the survey for patent for the Butte & Boston placer, and that prior thereto he accompanied Mr. Kemper to the ground and pointed out to him the boundaries of the patented ground adjoining (Tr. p. 1103). He testified: "My information was in December, 1890, to the effect that this ground was located but no discoveries had been made; I was so informed by Mr. Kemper, I think. Mr. Kemper undoubtedly knew at the time I was out there that the ground was covered by quartz locations; a few days afterwards I made my official survey of this ground in question, and to be sure that there could be no injustice done by going to placer too rapidly, I showed the openings, the alleged discoveries on this ground on the Pleasant View claim. * * * When I went there in December with Mr. Kemper, I presume he knew that the ground was located then; the ground was covered with stakes. * * * At the time I was out there I went to the Pleasant View discovery hole or within a very few feet of it, and Mr. Kemper was along, but I don't remember whether I saw quartz on the dump." (Tr. pp. 1146-7.)

It is Mr. Wilson's theory that "the mineralization of this territory, outside of the fissure veins, was not accomplished from faulting; it was accomplished from erosion of the country and by the carrying down in

solutions of a very little, slight saturated copper, or waters carrying copper, in connection with sulphuric acid, that was obtained, of course, from the deposition of the original chalcoprite which it contained in minute quantities along the granite of this neighborhood; carrying it down into little fault fissures * * * and into joint planes of the granite * * * and in channels for the descending waters to enter." (Tr. p. 1172.)

And Mr. JULIUS H. WARNER, a mining geologist, testifying with reference to the conditions appearing in tunnel 31, stated: "In the second cross-cut north, a distance of about 20 feet north of the tunnel, a well-defined fracture zone following an aplite dyke is evidenced, twelve to fifteen inches in width. Along this zone of fracture there has been a considerable deposition of chrysocolla. The immediate hanging wall is granite; the immediate footwall is aplite. As to this mineralization, there is evidence to me that it is anything further than the surface infiltration along this zone of chrysocolla and iron oxide." (Tr. pp. 1203-4.)

And the same witness testified: "These zones from a generic standpoint, I would not think are veins such as are followed successfully in the Butte camp. At the particular point noticed, in so far as they have indications of value, that might lead a miner to follow them with the expectation of finding ore—producing ore,—they might be considered veins. *I would say they would justify a miner in following them.* Right in

that cross-cut I think he might take out some ore, and similar conditions might exist at that elevation to some extent in both directions. I would not expect that condition to continue to any great depth," (Tr. p. 1215.) "There is no question, I think, in my mind but that there are two occurrences in shaft 31 or tunnel 31, that would warrant the miner in following them in the hope of finding ore. I call them veins in that sense; they do not show to me those typical characteristics which we usually find accompanying the real veins of this camp." (Tr. p. 1245.) "I would call those two separate veins from the standpoint of a miner. The dip of the most southernly one was 76° to the north, and the dip of the northernly one was 80° to the north." (Tr. p. 1246.)

And it would seem to be the opinion of this witness that in order to justify a miner in locating a vein it must carry commercial ore. (Tr. p. 1271.)

And WILLIAM B. FISHER, a witness for the plaintiff, admitted that there is a well defined vein in the north cross-cut from tunnel 31, and that the vein shown in the tunnel itself is the same vein (Tr. p. 1304). And the same thing is admitted by Mr. Warner, a geologist called on behalf of the plaintiff (Tr. p. 1248). And Frank A. Linforth, a geologist and mining engineer, called to testify for the plaintiff testified to the same effect (Tr. p. 1388). And see the testimony of Dennis Kennedy to the same effect (Tr. p. 1541).

SIMEON V. KEMPER, the vice-president of the plaintiff corporation, testified that he had known the ground in controversy since 1877 and 1878, and that he has known it intimately since 1890, at which time he was one of the locators of the Butte & Boston placer. He assisted the U. S. Deputy Mineral Surveyor in surveying the ground for patent (Tr. p. 1556). He visited the ground a number of times during the summer of 1891, and every time he went out there it was for the purpose of examining the ground and workings, and he remembers that there were several shafts sunk there; his inspection was sufficient to acquaint him with all the shafts on the ground in the summer of 1891 (Tr. p. 1557). He placed the location notice upon the ground himself on the 20th of December, 1890, (Tr. p. 1573), and located it as placer because he could not find a discovery upon which to base a quartz location (Tr. p. 1572). He also saw ore on the dump of the Hornet discovery shaft in 1891, and he saw some good float there on the surface of the ground (Tr. p. 1575). Notwithstanding the fact that there was, in his opinion, no lead or vein discovered upon this ground, he gave away one-third of the Butte & Boston Placer in settlement of the adverse suit commenced by the quartz claimants against the placer application "because it is always cheaper to compromise than it is to pay lawyers." (Tr. p. 1575.)

ARGUMENT.

The ground covered by the Butte and Boston placer embraces twenty-nine acres, as shown on the map. In April, 1890, Mr. Passmore and Mr. Hamilton first located this ground. The locations made by them were called the Point Pleasant and the Pleasant View Quartz Lode Claims. The discovery shaft of the Point Pleasant claim was at the eastern end of the claim and outside of the ground afterwards located as the Butte and Boston Placer. The discovery of the Pleasant View was within the boundaries of the placer location. It seems that in the case of the Pleasant View, in the discovery shaft, a boulder of quartz was encountered, and the locators, presumably, believed that they had reached bedrock, and utilized this exposure as a discovery. It is more than likely from the proof, that the quartz boulder encountered existed in the wash, and was not rock in place. In the case of the Point Pleasant, there can be no contention, as it seems to us, but that the discovery was sufficient to authorize the location of ground. The evidence as to the discovery stands uncontradicted, and the exposure, according to this evidence, was of such a character, with reference to mineralization, as to authorize the location of the ground under the mining laws of the United States.

The record discloses that the law was complied with, as to markings, boundaries and posting notices,

and the notices were recorded within the time prescribed by law.

On December 20, 1890, the ground practically covered by the quartz locations mentioned, was located as the Butte and Boston placer, and the application for the placer patent was made on the 11th of May, 1891.

Mr. Louis Mason, one of the defendants, in this case, became interested in the quartz locations above referred to, and, on the 16th of April, 1891, began to do some work on the ground. It is contended, on the part of the appellants, that before the 11th of May, 1891, Mr. Mason sank three shafts on the lead of the Point Pleasant claim, and that in each of these shafts, the lead was encountered. These shafts are referred to as Shafts 1, 2 and 3. Mr. Mason, likewise, before the date specified, sank a shaft on the lead of the Pleasant View. This shaft, in this controversy, is referred to and designated as the Hornet shaft.

Appellants contend that as to the Point Pelasant location, the ground covered by the location, when the placer location was made in December, 1890, was segregated from the public domain, and was not then subject to location, and that, as to that location, it is not a matter of twenty-five feet on each side of the lead. As to the Pleasant View location, however, by reason of the location of the ground as a placer in December, 1890, before the Hornet lead, so-called, was

discovered the next year, it is simply a case of a known lead within the boundaries of the placer. Of course, the proposition, as to the existence of a known lead is, likewise, involved in the consideration of the Pleasant View lode.

Section 2333 of the Revised Statutes of the United States provides as follows:

“Where the same person, association or corporation is in possession of a placer claim and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case, a patent shall issue for the placer claim, subject to the provisions of this Chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of such placer claim or any placer claim not embracing any lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings, and where a vein or lode, such as is designated in Section 2320 is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the

placer claim has no right of possession of the vein or lode claim, but where the existence of a vein or lode, in a placer claim is not known, a patent for the placer claim shall convey all valuable minerals and other deposits within the boundaries thereof."

The period when knowledge of the existence of the lead is fixed is at the time of application for the placer patent,—in the present case, the 11th of May, 1891.

The Supreme Court of the United States, in the case of

Reynolds v. Iron Silver Mining Co., 116 U. S. 697,

considering and construing this section, said:

"We are of opinion that Congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in clear terms."

In the same case and at a later date, 31 Lawyers' Edition, 464, the same tribunal said:

"When this case was formerly before us, it was held that if a lode or vein of gold, or silver, was known to exist within a placer claim at the time the application for a patent was made, the patentee could not recover its possession, even as against a mere intruder. The patentee having no title to such lode or vein by reason of its ex-

ception from his patent under the statute, could not enforce any legal right to it against anyone, being bound to rely upon the strength of his own title and not the weakness of his adversary's. The defendants, therefore, on this trial placed their defense upon this exception; and the question for determination was, whether the lode or vein in question was known to exist at the time the application for a patent was made."

In the case of

Iron Silver Mining Co. v. Mike & Starr G. & S. M. Co., 36 L. Ed. 293,

the Supreme Court of the United States said:

"In other words, the court ruled that if the vein was known to the placer patentee at or before entry and payment, although not known at the time of the application for patent, it was excepted from the property conveyed by the patent. Into this ruling the court was doubtless led by the language of the patent, which in terms exempts all veins or lodes known to exist at the date thereof; that is the date of the issue of the patent. In this respect, there was error. The time at which the vein or lode within the placer must be known in order to be excepted from the grant of the patent is, by section 2333, the time at which the application is made."

Our inquiry, then, is directed to the conditions existing as to known leads on and prior to the 11th day of May, 1891. It is true that as to the Pleasant View location, no discovery being made before the placer location, and such discovery being essential to render the quartz location valid, the placer location, as to that ground, would be effective; the known lead, of course, being excluded. The doctrine seems to be that where no intervening rights arise, and the discovery is not made at the time when the notice is recorded, but is made at a time subsequent thereto, the doctrine of relation back applies. This is the rule announced by the Supreme Court of the United States, whose declarations on these matters are controlling and final, in the case of

Creed & C. M. Co. v. Uintah T. M. & T. Co.,
49 L. Ed. 508.

See also

139 American State Reports (Note) pp. 162-163.

By reason of the application for the placer patent, adverse proceedings were instituted by the quartz claimants, and actions were instituted, pursuant to law. These actions were compromised, and, as the result of the compromise, a placer patent issued; the patentees conveying to the quartz claimants a portion of the ground patented as placer ground the same being the easterly portion of the ground. After this compro-

mise was effected, a portion of the ground was again located in 1895 by Lee Davenport as the Lynne quartz claim; the Hornet discovery shaft, so-called, being utilized as the discovery for the location, and some work was done upon the ground in the way of representation work by the new locator.

Mr. Mason was interested in the Lynne location. In 1900 Kift and Noyle again located the ground partly covered by the Pleasant View location, and as a discovery, cleaned out the old shaft and ran a cross-cut towards the north; the locators claiming that in this cross-cut, mineral was found authorizing a location. Before the Hornet location was completed, Mr. Mason obtained from the locators a lease and bond on the ground covered by the location. Some controversy arose as to the conveyance of the Hornet under the lease and bond, and, in consequence of this, an action was brought to compel a transfer of the property under the lease and bond, which resulted successfully; so that the Hornet location became the property of Mr. Mason and his associate, Mr. Merri-man, and to provide against an attack on the validity of the Hornet location, should one be made, Merriman, after acquiring the interest which he did, located the ground as the Gulf quartz lode claim and a portion of it as the Hope quartz lode claim, and, likewise, located the ground theretofore covered by the Point Pleasant location, calling the new locations the Rabbit and the Olivia. These claims, necessarily, overlapped,

as an inspection of the maps will disclose, but the locations were made by the same parties, and were made to cover any defects that previous locations might possess or disclose.

In connection with the several locations referred to, the necessary markings were made and the necessary notices of location recorded. After the lease and bond was given on the Hornet in 1900, work was carried on by Mason and Merriman on the ground covered by the location, and the Mullins tunnel, so-called, as it now exists, was run. To prevent the extraction of ore uncovered in this tunnel, a suit was instituted by the Butte Land and Investment Company, the grantee of the placer patentees, against Merriman and Mason and others. In the trial court, it was held that the compromise effected in 1895 and the judgments entered pursuant to the terms of the agreement estopped Merriman and his associates from claiming that there were known leads on the ground. The trial court held in favor of this contention. The Supreme Court, reversing the judgment of the lower court, declared differently.

Butte Land and Investment Co. v. Merriman,
32 Mont. 402.

That action is still pending undetermined. The Butte Land and Investment Company transferred its interest to the present complainant, a foreign corporation, and the present suit was instituted. Transfers

have been made of interests in the ground covered by the quartz locations, so that the present defendants claim the ground on account of the transfers so made.

Appellants contend in the first place, that by reason of the Point Pleasant location, made in 1890, antedating the placer location, the ground embraced in the Point Pleasant location was not open to entry. This being true, and the court finding that the location was valid, it is not a question of twenty-five feet on each side of the lead. In that event, the entire ground covered by the quartz location in question, would be excluded from the placer patent.

Assuming now that the quartz location was valid, let us inquire what rights the locators acquired, and in what situation the ground was as being subject to location at a subsequent date.

In the case of

Forbes v. Gracey, 94 U. S. 767,

the Supreme Court of the United States, speaking of mining claims said:

“A mining claim perfected under the law is property in the highest sense of that term which may be bought, sold and conveyed, and will pass by descent.”

And in the case of

Belk v. Meagher, 104 U. S. 229, 26 L. Ed. 736,

the same tribunal speaking of mining claims, adopted its language in the case just referred to, and said:

"Mining claims are not open to re-location until the rights of a former locator have come to an end. A re-locator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has, in law, abandoned his claim and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence, a relocation on lands actually covered at the time by another valid and subsisting location is void, and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

Nash v. McNamara, 93 Pac. 405.

And in the case of

Wolf v. Manuel, 152 U. S. 505, 38 L. Ed. 532,

the same court, speaking on the subject, after referring to Section 2319 Revised Statutes of the United States, said:

"And by Section 2322, it is provided that when such qualified persons have made discovery of

mineral lands and complied with the law they shall have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and that when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession."

In the case of

Mantle v. Noyes, 127 U. S. 348, 32 L. Ed. 168:

"There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak Lode Mining Claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked its boundaries by stakes, so that they could be readily traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their

title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale. The location having become completed in April, 1878, antedates by some months the application of the defendant for a patent for his placer claim. That patent was subject to the conditions of Section 2333 of the Revised Statutes, which is as follows:

“Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is

described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.'

"This section was before us for consideration in *Reynolds v. Iron Silver Mining Company*, at October Term, 1885, 116 U. S. 687 and also at the present term, 124 U. S. 374. As stated by the court at both times, it makes provision for three classes of cases:

1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within its boundaries, he must state the fact, and then on payment of the sum required for a vein claim and twenty-five feet on each side of it at \$5 an acre, and \$2.50 an acre for the placer claim, a patent will issue to him covering both claim and lode.

2. Where a vein or lode, such as is described in a previous section, is known to exist at the time within the boundaries of the placer claim, the

application for a patent therefor, which does not also include an application for the vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.

3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral and other deposits within its boundaries.

The section can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States, and are in possession of the locators or their assigns; for, as already said, such locations when perfected under the law are the property of the locators, or parties to whom the locators have conveyed their interest. As said in *Belk v. Meagher*, 104 U. S. 279, 283; 'A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent.' It is not, therefore, subject to the disposal of the government. The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for the patent must include them in his application, or he will be deemed to have declared that

he had no right to them.' Sullivan v. Iron Silver Min. Co., 109 U. S. 550, 554."

This court in the case of

Migeon c. Montana Central R. Co., 77 Fed. 249,

said:

"Before proceeding to discuss the controlling question, it is proper to state that appellants are not claiming any title under the Morning Star Lode location. Their application for a patent was made for the Childe Harold Lode Claim, which was located after the issuance of the patent for the placer claims. Appellants, however, argue that the placer patent as to the west 730 feet of the Morning Star claim is void, for the reason that at the time of the application for the placer patent the west 730 feet of the Morning Star was property which was withdrawn from sale by the United States; that any patent purporting to convey any portion of the ground was an absolute nullity; that the Noyes placer application did not include the Morning Star Lode; that neither said application nor the patent could include the said 730 feet of the Morning Star lode; that the title thereto remained in the government, in trust for the claimants under the existing location of the lode claim and their assigns, to be perfected upon the performance by them of the acts

required by law. This argument is based upon the assumption that by a mere location of a quartz lode the ground is withdrawn from sale, independent of the question whether a lode is discovered or known to exist. If the Morning Star was a valid and subsisting location at the time of the issuance of the patent to the Noyes placer claims, an important and interesting question would be presented as to whether, in a case like the present, the patent could be collaterally assailed. The law is well settled that a mining claim that has in all respects been fully perfected under the requirements of law is property in the fullest sense of that term, and therefore, during the time of its valid existence as such, would not be subject to the disposal of the government to other parties. *Belk v. Meagher*, 104 U. S. 279, 283; *Noyes v. Mantle*, 127 U. S. 348, 353, 8 Sup. Ct. 1132, 1134. But the fact is, as appears from the testimony in the record, that the Morning Star lode claim had been abandoned prior to the time of the issuance of the patent to the Noyes placer claims. This being true, it follows that the land embraced in the placer patent was, at the time of the issuance of the patent, a part of the public domain, which the government had the power to sell and dispose of."

Having in mind the force of the declarations in

the decisions referred to, and applying them to the facts before us, should it be found that the Point Pleasant location was valid, at the time of the application for the placer patent, there was a segregation of the ground from the public domain. It was not subject to location. The Government had parted with the possessory title, and held the legal title in trust for the quartz claimants.

This necessarily brings up for consideration the essentials of a discovery in the case of a location of the public lands of the United States for the minerals therein contained. Section 2319 of the Revised Statutes of the United States throws open to exploration and purchase the valuable mineral deposits in lands belonging to the United States; and in the Eureka case,

4 Sawy. 302, Fed. Cas. 4548,

Justice Field adopted the language of Judge Hallett defining a lead. His definition of a lead is as follows:

“To determine whether a lode or vein exists it is necessary to define those terms, and, as to that, it is enough to say that a lode or vein is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well estab-

lished, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption may be regarded as a lode, whatever boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein. * * * Reverting to that definition, if there is a continuous body of mineral or mineral-bearing rock extending from one claim to the other, it must be that there are boundaries to such body and the lode exists; or if there is a continuous cavity or opening between dissimilar rocks, in which ore in some quantity and value is found the lode exists. These propositions are correlative and not very different in meaning, except that the first gives prominence to the mineral body and the second to the boundaries. Proof of either proposition goes far to establish a lode, and it may be said that without proof of one of them a lode cannot exist. * * * Excluding the wash, slide, or debris on the surface of the mountain, all things in the mass of the mountain are

in place. A continuous body of mineral or mineral-bearing rock, extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein."

See also:

Iron Silver Mining Co. v. Cheesman, 116 U. S. 535.

And as to rock in place, Justice Miller, in the case of Stevens v. Williams, 1 McCrary, 480 Fed. Cas. 13, 413, said:

"I want to say that by rock in place I do not mean merely hard rock, merely quartz rock, but combination of rock, broken up, mixed up with minerals and other things, is rock within the meaning of the statute;"

And in

Tabor v. Dexter, Fed. Cas. 13,723, Judge Hallet said:

"Whether the ore is loose and friable, or very hard, if the inclosing walls are country rock, it may be located as a vein or lode. But if the ore is on top of the ground, or has no other covering

than the superficial deposit, which is called alluvium, diluvium, drift, or debris, it is not a lode or vein within the meaning of the act, which may be followed beyond the lines of the location. In this bill it is alleged that the overlaying material is boulders and gravel, which cannot be in place as required by the act. * * * For the decision of this motion it is enough to say that where the mass overlaying the ore is a mere drift, or loose deposit, the ore is not in place within the meaning of the act. Upon principles recently explained, a location on such a deposit of ore may be sufficient to hold all that lies within the lines; but it cannot give a right to ore in other territory, although the ore body may extend beyond the lines."

And in the case of

Burke v. McDonald, 33 Pac. 449,

the Supreme Court of Idaho said:

"It must be remembered that every seam or crevice in the rock, even though filled with clay, earth, or rock, does not constitute a vein, nor every ridge of stained rock its cropping; nor, on the contrary, is it required that well-defined walls shall be developed or paying ore found within them. But something must be found in place, as rock, clay, or earth, so colored, stained, changed, and decomposed by the mineral elements as to

mark and distinguish it from the inclosing country."

If the Point Pleasant location was a valid location on the 11th of May, 1891, when the application for the placer patent was filed, then, as we have already stated, the ground covered by the location was not then subject to location. As to that location, it cannot be successfully contended, in the light of the proof, that a valid discovery was not made. It cannot be successfully maintained, as suggested in the decision of the learned trial court, that there was an abandonment of these locations. We are not contending that as to the Pleasant View location, it had validity against the placer location made before a discovery was made by the locators of the Pleasant View. We do insist, however, that Mr. Mason, from the commencement, insisted that these quartz locations were valid, and in all of the subsequent locations of the ground, we find him in the ownership of portions of it. We find him in the adverse suits, and after a compromise was effected, so that a placer patent issued, we find him interested in the Lynne location, and in 1900, when the Hornet location was made, he immediately acquired a lease and bond on the property, and afterwards secured a conveyance of same, and when the Gulf and Hope and Olivia and Rabbit locations were made in 1900, he acquired an interest in them. So that the ground in controversy from its first location in

1890 down to the present time has been, from the standpoint of the appellants, in their occupancy, and during all of this time work was done to maintain the integrity of the quartz locations.

We contend, then, that if the ground covered by the Point Pleasant location was located in 1890 before the ground was located as placer, it is not a case of getting the lead that traverses that ground, with twenty-five feet on each side of same, but it is a case of excluding from the placer patent all of the ground covered by the Point Pleasant location.

In this connection, and in this place, we might also discuss the legal aspects of leads not covered by locations but known to exist when the placer application was made, and especially for the purpose of determining whether the land should possess characteristics different from those in case the ground was about to be located under the mining laws of the United States.

We have already seen by the decision of the Supreme Court of the United States, in the case of *Mantle v. Noyes*, *supra*, that if the ground was located when the application for patent was made, Section 2333 would have no application. Assuming now, however, that no location was made at all, and the contention is indulged in that known leads were upon the ground, what are we required to show as to their character and mineralization? The record in this case so voluminous is largely so because of the theories advanced by geologists, some of them of national reputation,

as to what constitutes veins and vein matter. We have definitions of veins from these eminent gentlemen, and while no particular objection can be interposed to their definitions, their requirements of veins when applied to the facts largely transcend what their definitions suggest.

In the case of

Noyes v. Clifford, 37 Mont. 138,

the Supreme Court of Montana holds that known leads excepted from placer patents differ in no respect from leads on which locations may be made. The instructions which were given in that case, and the instructions which were refused, presented for determination the question as to what constitutes a known lead. The instructions which met the approval of the court were as follows:

"No. 7.—

"The Court instructs the jury that a vein, as the same is understood and defined by law, is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. In this definition the elements are a body of mineral or mineral-bearing rock and the boundaries. With either of these well established, very slight evidence can be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and

without interruption, may be regarded as a lead, whatever the boundaries may be. In the existence of such a body, and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lead. Such boundaries constitute a fissure, and, if in such fissure ore is found, although at considerable intervals, and in small quantities, it is called a vein or lode. The jury is instructed however, that not every vein or lode within the exterior limits of a placer claim is excepted from a placer patent unless the application is made for such vein or lode when the patent for the placer is applied for; but only such a vein or lode as comes within the definition of a known vein or lode as the same is defined in these instructions.

“No. 8.—

“A known vein, within the meaning of the term as used in these instructions, is a vein known to exist at the time of the application which has been clearly ascertained, and is of such an extent and value as to render the land more valuable on that account and to justify its exploitation and extraction of the mineral therefrom. This does not necessarily mean that the vein must show mineral values to such extent as would make the working of the same a profitable pursuit at the place where it is exposed; nor is it necessary that

the values contained shall be such as to demonstrate or prove that there exists a shoot or body of ore within the vein which it will pay to develop and extract. The phrase 'of such value as to justify the exploitation of the vein and extraction of the mineral therefrom,' is intended to mean, and does mean, that the vein is of such a character as would justify an ordinary person who was seeking in good faith to develop a mine in developing and working upon the same vein. In considering, however, the question as to whether or not any vein is a known vein, within the meaning of the term, it is proper, and you should take into consideration the amount of ore, the facility of working and reaching it, as well as the produce per ton which might or could be obtained therefrom, at the time of the application for patent."

Justice Field, in the case of

Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mng. Co., 143 U. S. 496, 36 L. Ed. 211, said:

"As stated above, there can be no location of a lead or vein until the discovery of precious metals in it has been had. And then it is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent of the ground embracing it, but those only which

possess these metals in such quantity as to enhance the value of the land and invite the expenditure of time and money for their development. No purpose or policy would be subserved by excepting from sale and patent veins and leads yielding no remunerative return for labor expended upon them. Such exceptions would only be productive of embarrassment to the patentee without any benefit to others."

This subject is very ably discussed in Costigan on Mining Law, under the heading "Lodes within Placers," where may be found all of the recent cases which give the subject consideration.

Costigan on Mining Law, 260 et seq.

It is a conceded fact, or, necessarily, must be so in this controversy, that there are some leads existing, and, it is, likewise, a conceded fact, or, necessarily, must be so, that one of these leads is in the ground originally located as the Point Pleasant. It is claimed, however, that these leads have been encountered by operations carried on subsequent to the date of the application for a patent, and that neither in the excavations made in connection with the original quartz locations, nor in the openings made by Mr. Mason, were leads disclosed, and that, consequently, their existence was unknown when the application for placer patent was made, and when the ground was located as placer ground. It is

an admitted fact that openings were made, but it is contended that they were surface openings, and that bedrock was not reached. While it is true that the evidence on these matters is conflicting, it seems to us that with the exhibits produced, and when we consider the requirements of the appellee as to what should constitute a lead to authorize the location of the ground as mineral ground, or to authorize the exclusion of a lead from a placer patent as a known lead, this conflict is more apparent than real.

The appellee contends that, in order to make a lead a known lead, its requirements must be entirely different from those where a location is made. Indeed, it is seriously contended that in the case of a known lead, its existence throughout the entire ground in controversy must be clearly established through a disclosure of the same. Such a requirement is unreasonable and unjustifiable. In this case, if these requirements have to be complied with, it will be necessary to make an excavation of probably hundreds of feet in depth before bed-rock is reached. Surely, the law does not require this, in order to demonstrate that the lead is a known lead. The time that would be consumed to accomplish this, with proceedings pending to have the ground patented as placer ground would render the task impossible of performance. The expert evidence, and, indeed, nearly all of the evidence adduced in behalf of the appellee, is of that character, and presents for consideration the theories of geologists

apparently at variance with the experience of practical miners. These theorists are forced to admit that a mineralization exists which makes the ground valuable for mining purposes. They tell us, however, that this mineralization occurred by reason of the erosion of the superincombent granite, which contained copper, and through descending agencies the material in the crevices or fissures became impregnated with copper. Of course, it matters little whether the mineralization resulted from descending or ascending agencies if it exists, and exists in such quantity as to give peculiar value to the ground, as possessing mineral. The ground, under those circumstances, is subject to disposal under the mineral laws of the United States.

We insist most respectfully that on the entire evidence with the physical facts corroborative of same, the proposition is not a debatable one that the leads on this ground were known to exist on the 11th of May, 1891, when the application for a placer patent was made. The ore on the dump where the Hornet shaft, so-called, was sunk, was so rich in copper contents as to excite general comment, and the ground itself had such physical characteristics as to surface, that any excavation made therein could readily be discerned.

Indeed, the appellee does not say that the leads do not now exist. The evidence offered by it affirmatively shows that they do exist. As the case now stands, it is an admitted fact that there is a north lead

and a south lead. It is said, however, that these leads were not encountered when the application for a placer patent was made. It is said that the south lead is disclosed in the Mullins tunnel, so-called, and the north lead is disclosed in the cross-cut of tunnel 31, and in the tunnel in its course to the east beyond the cross-cut, until cut off by a fault fissure.

Appellee's geologists, however, say as to this, that this mineralization is due to fault fissures; is due to the chrysocolla and cuprite found in the rock there, and is not the result of vein formation or vein mineralization, but, as already stated, is due to the result of the erosion of the granite. We are told by them, that through the process of erosion, six or seven hundred feet of granite have been removed, and that the small quantities of copper in this granite taken up by water have been disseminated in such a way that this mineralization, confessedly existing, has occurred in this ground. They tell us, as we have already stated that the mineralization existing is due to descending waters impregnated with copper rather than to ascending vapors impregnated with the same mineral. In other words, we have fine-spun theories in the effort to explain away facts which, without these theories, would justify the contention that the mineralization is of such a character as to constitute veins or lodes. In this way did the property in question present itself, as shown by the proof in this record, with evidence of mineralization existing, when Mr. Kemper pre-

sented his application for a placer patent. While it is true that inquiry is foreclosed as to the placer value of the ground, it becomes pertinent inquiry,—the ground confessedly having value,—to ascertain what gave it this. It has no value for townsite purposes; its agricultural possibilities likewise worthless, and yet from the standpoint of the appellate, it is valuable property. In what does its value consist? It is valuable, either because of placer deposits there, or because of the quartz leads which exist. There is no pretense whatever that it has any value whatever by reason of any placer gold existing there. All of the witnesses say this, and its history from the time it was located by Mr. Kemper down to the present time corroborates the declarations that it is utterly destitute of placer gold. This fact was just as patent in 1891 as it is today. This being true, Mr. Kemper's activities towards securing title to it, can only logically be explained upon the hypothesis that he knew of the existence of these two leads traversing the ground. While this evidence cannot be considered, as affecting the validity of the patent, it is nevertheless competent to show the comparative value of the ground, and it is competent to show the ground is more valuable on account of the quartz veins than for any placer gold which it contains.

The learned trial judge, seemingly, for its persuasive effect, referred to the fact that if these lands were known leads at the time the placer application

was made, the placer applicant would, undoubtedly, have revealed that fact, and by paying the additional sum required by law would have secured title to the leads. This circumstance is dwelt on as one suggestive that these leads were not known to exist when Mr. Kemper presented his placer application.

We submit that this circumstance possesses little, if any, intrinsic merit. We would be disposed to say that this circumstance is utterly devoid of any persuasive value. An acknowledgment by Mr. Kemper that these quartz leads existed would render invalid his location of the ground as placer ground, because, as already stated, the ground was located at the time as quartz, and the locators insisted that these locations were valid locations. An admission then, on the part of Mr. Kemper, that the leads existed would render invalid his location of the ground as placer ground. It is, likewise, suggested in the decision of the learned trial judge that the quartz locations made before the placer location were abandoned. We do not believe that this contention, on the evidence, can be successfully maintained. It is true that the original locations weren't kept alive as such, but the ground covered by these locations, at no time after its location in 1890 became a portion of the public domain. Representation work was done upon the ground until after the compromise was effected as the result of the adverse suits against the granting of the placer patent, and, as we have already stated, from the time that

Mason acquired his interest in the quartz locations in the spring of 1891, down to the present time, he has always preserved an interest in the ground in question. As we have seen, on account of the location of the ground by Mr. Kemper, and, on account of his attempt to patent same, adverse proceedings were instituted by the quartz claimants, and, as a result of the compromise in 1895, Kemper's application was permitted to go to patent upon his agreeing to deed to the quartz claimants about one-third of the ground. The next step in the proceedings was the location of a portion of the ground as the Lynne, in which Mr. Mason was interested. This occurred in 1895. In 1900 the Hornet location was made, followed in rapid succession by the Gulf and Hope, expressive of a desire to get the southerly or Hornet lead. The northerly lead was covered by the Rabbit and Olivia discoveries, seemingly, with like intent. Since that time, work has been done in various tunnels and shafts, which dot the ground. We have, then, a constant, unchanging and continuous attitude as to the existence of these leads from the time Mason purchased the interest in 1891 down to the present time. If actions speak plainer than words, we have a persistent and insistent contention on his part as to the existence of these leads, and we have actions on the part of Mr. Kemper as clearly persuasive, evidencing the knowledge on his part that these leads existed, despite his statements to the contrary.

We respectfully submit that in the light of this evidence, which stands uncontradicted in the record, the learned trial judge is in error in declaring that an abandonment of those early quartz locations occurred.

Canvassing the evidence as we encounter it, we contend that the northerly lead is disclosed in shaft No. 21; it is disclosed in tunnel 30; it is disclosed in the Rabbit discovery, and is disclosed in tunnel 31. The appellee admits that a lead is disclosed in tunnel 31 and possibly at one or two other points. We, likewise, contend that the southerly lead is disclosed in the Hornet discovery and in tunnels 34, 35 and 36 and in shaft No. 19.

It is true that all of the openings except shafts 21 and 19 are off the ground in controversy. They are, however, within the ground covered by the Butte and Boston placer location.

Appellee contends that if the leads are disclosed in the openings in question it is no proof that they exist elsewhere. The proof discloses that the leads as they are disclosed, are strong, and that they, undoubtedly, continue on their course. The tests and requirements which the appellee demands and applies, we have already in a general way declared, would render mining operations impossible of accomplishment. The application of these tests would render impossible the transfer of mining property, for, without exposure of a vein throughout the entire distance, no presumption could be indulged in that it continued beyond the

point where the eye covered it. The test demanded by appellee would render impossible even the location of the ground. The cry is "No lead unless you encounter it." The law governing the location of quartz claims is at war with such contention. The locator is only required to discover mineralized rock in place, and local requirements in the different states require some work in the way of a shaft or tunnel exposing the vein, and from these discoveries the locator is required to fix the strike of his lead and is given fifteen hundred feet of it. The geologists who testified for appellee say that a lead is where you find it, and where you do not find it, on account of its being covered, you cannot assume that it exists or extends there.

Of course, if this is correct and if the lead that is to be claimed must be exposed to view throughout its entire distance, then appellants have no standing in this controversy in so far as excepting known leads is concerned. So far as the ground in controversy is concerned, the leads are exposed only in two deep shafts, and, in order to uncover the leads in their westerly course, it would be necessary to run tunnels along the leads. Only in this way, so we are told, can we make the leads known leads. This contention, on the part of the appellee, is without merit and cannot be sustained.

In the case of

Iron Silver Mng. Co. v. Mike & Starr G. & S. Mng. Co. *supra*, the vein was nowhere disclosed on the surface, and was discovered in the running of a tunnel, and the discovery of it there was the only exposure of it when the application for a patent was made, and by the Supreme Court of the United States, this was deemed sufficient. Surely, such a contention on the part of the appellee cannot find any support in the decisions on the subject. It is at variance with the language of the Supreme Court of the United States in the case of

Iron Silver Mng. Co. v. Reynolds, 124 U. S. 374, 31 L. Ed. 466;

there the court says:

“Knowledge of the existence of a lode or vein within the boundaries of a placer claim may be obtained from the outcrop within such boundaries; or from the developments of the placer claim previous to the application for a patent; or by the tracing of the vein from another lode; or perhaps from the general condition and developments of mining ground adjoining the placer claim. It may also be obtained from the information of others who have made the necessary explorations to ascertain the fact, and perhaps in other ways. We do not speak of the sufficiency of any of these

modes, but mention them merely to show that such knowledge may be had without making hopes and beliefs on the subject its equivalent. As was observed by the court, when the case was heard before, it is better that all questions as to what kind of evidence is necessary, and we may add sufficient, to prove the knowledge required by the statute should be settled as they arise."

We have evidence that these leads are continuous; that they extend beyond the openings where they are disclosed, and that the vein matter in the different openings, although somewhat differing in appearance is a portion of the same vein.

Against this evidence, as to the existence of these leads, the mining geologists who testified for appellee advanced theories as to the cause of the mineralized material uncovered in the several openings. These gentlemen tell us there are two veins; one exposed in the Mullins tunnel and the other exposed in the north cross-cut of tunnel 31, with some indications of a vein in the Rabbit discovery shaft, and with some indications of a vein in the cross-cut in the number 9 shaft. They tell us that, undoubtedly, the vein in the Mullins tunnel is a true fissure vein, exhibiting all of the characteristics of a true fissure vein, but as indicative of their bias, they declined to say whether it extends in either direction beyond where exposed. With equal pertinacity they contend that the lead ex-

posed in the cross-cut or tunnel 31 may or may not extend beyond the place of exposure. They plant themselves squarely on the proposition that the lead is where you see it, and only where you see it, and although experience warrants the assumption that the lead continues in this case, the geologists cannot be persuaded to admit the possibility of its continuance.

When we submit to these gentlemen vein material, so designated by us, and vein material on account of the mineralization which it presents, we are advised that this copper found in the rock was deposited there by descending water, and when vein material is conceded to exist, we are advised that it is existing in a fault fissure, not in a vein fissure, and exhaustive explanations are furnished differentiating between fault fissures and vein fissures, vein quartz and vein filling, and veinlets, and so the record assumes the voluminous proportions which it does, to furnish a vehicle for this profound knowledge of geology as to the occurrences of a time millions of years removed.

One cannot leave these expositions as to vein formation without being forced to the conclusion that those gentlemen, fortunate in the possession of this knowledge, have used the same to very poor advantage. To them, the existence or non-existence of a vein is an open book, and judging from their statements, little difficulty is experienced in determining where a vein exists and its value at depth, and, yet, as the record discloses, few, if any, of them ever located a mining

claim. The question was put to many of them as to whether they did so, and the astounding fact was disclosed that no such locations were made. Mr. Mullins, we submit, with the practical experience of a quarter of a century behind him, is as competent as a geologist in a mining district to tell ore from country rock. It cannot be maintained that this witness was disposed to favor appellants, and knowingly, he would not do so, if he could possibly avoid it. His evidence shows that in many openings that he examined, he said he found no evidence of a lead, but when his attention was called to material taken from these openings, and about which there could be no doubt, he had no hesitancy in declaring the samples lead matter. Exhibit 27 he pronounced ore. The geologists said it was country rock stained. This was equally true as to Exhibit 37. His attention was called to Exhibits 30 and 31, which he pronounced vein material. These samples came from shafts 1 and 2. The geologists pronounced the material in shaft 1 a hard rib of granite, and in shaft No. 2 aplite, and so the instances might be multiplied indefinitely. As the case stands, it is a conceded fact that some leads exist within the limits of the ground patented as placer. The leads as they now exist, and as they are conceded to exist are removed, so appellee contends, some distance from the openings which were made upon the ground before the 11th of May, 1891. We, the appellants, contend that the leads were disclosed in these

openings, and the ground was of such a character that any person at or near the ground could easily and readily see the openings and the dumps which these openings brought into existence. The exhibits, exceedingly numerous, speak for themselves, and they are presented with the expectation that they will speak for themselves, and these samples will reveal the fact that the ground from which they were taken was, in most cases, highly mineralized, and, although the evidence may, seemingly, be conflicting, as we have already stated, this conflict arises by reason of the requirements of the witnesses for appellee as to what constitutes a vein, and as to how the mineralization of a fissure should occur.

We most respectfully insist that on the evidence presented, the learned trial judge should have held that the lands were known leads at the time of the placer application for a patent, and that in the case of the Point Pleasant location, the same was a valid and subsisting location when the ground was located as placer ground, and under the decision of the Supreme Court of the United States in the case of *Mantle v. Noyes*, supra, this round was excluded from the placer patent, and that this court should find for the appellants and in favor of their contention.

Respectfully submitted,

WALSH, NOLAN & SCALLON,

and

J. A. POORE,

Solicitors for Defendants and Appellants.